



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Billie J. Howard - Survivor Benefit Plan
Benefits for Former Spouse

File: B-238540

Date: August 30, 1990

DIGEST

A member who elected Survivor Benefit Program (SBP) coverage for his wife and child upon his retirement from the Air Force in 1977, who was divorced in 1985 with a property settlement agreement awarding the spouse 40 percent of his retirement income cannot be "deemed" to have elected coverage for the former spouse since he had not executed a voluntary written agreement to provide such coverage. Further, a Nunc Pro Tunc order issued by a state court in 1988 after the member's death purporting to amend the prior 1985 divorce decree to award an annuity to the former spouse is without effect since at that time no authority existed for a court to order SBP coverage incident to a divorce proceeding.

DECISION

Billie J. Howard, former spouse of Master Sergeant Gerald W. Howard, USAF, (Retired) (Deceased), appeals a denial of our Claims Group of her claim for a survivors benefits annuity. We uphold the denial of the Claims Group on the following basis.

Sergeant Gerald Howard was married to the claimant and they had one child, when he retired from the United States Air Force on July 31, 1977. Two weeks earlier he elected spouse and child coverage under the Survivor Benefit Program (SBP). He was divorced from claimant on August 23, 1985, under a Nevada divorce decree and property settlement agreement awarding claimant "40 percent of the net disposable income of husband's U.S. Air Force retirement benefits."

The member died on October 25, 1988, and subsequently, on November 23, 1988, claimant secured an order Nunc Pro Tunc, amending the prior decree to specifically provide that the court had intended in 1985 to award the claimant any survivors benefits to which she might be entitled by reason of the member's death. The Air Force and the Claims Group denied

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the claim on the basis that Sergeant Howard never elected SBP coverage for claimant as a former spouse nor entered into a voluntary written agreement to do so, despite the fact that he had continued to have SBP deductions made from his retirement pay.

The SBP program, 10 U.S.C. § 1447-1455, was established in 1972 as an income maintenance plan for the dependents of deceased members of the uniformed services. Upon divorce, a retired member's former spouse lost SBP annuity coverage. In 1983 Congress amended the SBP law so that a retiree could voluntarily elect coverage for a former spouse. In 1984 Congress further amended the law to provide a remedy in cases where an SBP participant enters into a voluntary written agreement to elect to provide an annuity to a former spouse incident to divorce proceedings, but then fails or refuses to make the election. The amendment provided that, in such case, the member "shall be deemed to have made such an election." 10 U.S.C. § 1450(f)(3). The legislative history of the 1984 amendment indicates that although a retiree's election to provide an annuity for a former spouse was to remain a voluntary act of the retiree, Congress recognized that the issue of whether an SBP participant would designate a former spouse as a beneficiary could very well become an item of negotiation in a divorce settlement. Congress concluded that if an SBP participant voluntarily agreed in writing to make such an election the former spouse should be entitled to rely upon the agreement. See 66 Comp. Gen. 687 (1987).

Prior to 1986 the SBP law specifically provided that nothing in the law authorizes any court to order any person to elect an annuity for a former spouse unless such person has voluntarily agreed in writing to make such an election. See 10 U.S.C. § 1450(f)(3) (Supp. I, 1983).

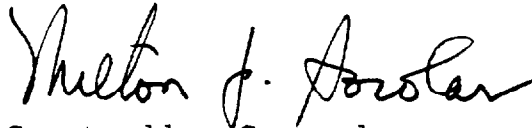
The SBP was further amended in 1986 to permit a court to order a member to elect former spouse coverage under 10 U.S.C. § 1448(b). The deemed former spouse election was also amended so that if the former spouse could demonstrate that the member was required by court order to make a former spouse election he would be "deemed" to have done so. These amendments pertained to orders issued after November 14, 1986. See Pub. L. No. 99-661, § 641, 100 Stat. 3816, 3885 (1986).

Thus, when the member was divorced in 1985, he could have elected former spouse coverage by voluntarily agreeing in writing to such an election or by including such election in the property settlement agreement which was incorporated into the divorce decree. It does not appear from the record that this was done. Therefore, a deemed election of an SBP annuity may not be granted.

The Nunc Pro Tunc order of November 1988 states that it was the court's intent in the 1985 proceeding to provide SBP benefits to the former spouse. The order issued in November 23, 1988, amended the order that the court issued on August 23, 1985. Thus, the SBP law in effect on the earlier date is controlling. As we noted earlier the SBP was not amended until 1986 to authorize courts to order members to provide SBP coverage for former spouses in the absence of a voluntary written agreement to make such an election. Accordingly, in the absence of a voluntary written agreement no authority existed for the court to order SBP coverage for the former spouse.

Finally, counsel for the claimant has submitted copies of receipts for SBP deductions which he maintains are evidence of an intent on the part of the member to elect annuity coverage for the former spouse. While this is not sufficient, in our view, to demonstrate the member's intent, it has no bearing on the disposition of this case. The law in effect at the time required a voluntary written agreement in order for a member to elect SBP coverage for a former spouse.

Accordingly, we conclude that there was no former spouse election made in this case and the Claims Group's denial is upheld.



Acting Comptroller General
of the United States